83-2088

In the Supreme Court of the United States

October Term, 1983

BAYOU BOTTLING, INC.,

Petitioner,

vs.

DR PEPPER COMPANY, and
COCA-COLA BOTTLING CO. OF LAKE CHARLES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Has the petitioner, as the only surviving competitor in an illegally monopolized market, suffered "antitrust injury" where the respondents blocked a procompetitive merger by petitioner, effected an anti-competitive merger and then used their resulting monopoly power to:

   a. foreclose effective price competition from the petitioner because of the great economies of scale resulting from the illegal merger;

   b. exclude from the market a competing, nationally advertised soft drink petitioner attempted to handle;

   c. exclude petitioner's products from 80% of the vending machines and coolers in the market;

   d. control 90% of the available store shelf space in the market;

   e. perpetuate below-cost and discriminatory pricing aimed at further reducing petitioner's market share?

2. In order for a court to determine whether a plaintiff has suffered "antitrust injury," should it first analyze the nature of the antitrust violations which were conceded to have occurred?

3. Is an antitrust plaintiff required to exclude hypothetical alternative non-antitrust causes of his injuries in order to show they are antitrust injuries?

4. Is a private plaintiff entitled to the remedy of divestiture under Section 16 of the Clayton Act where it is the only remaining competitor in a market that became monopolized through a merger conceded to be illegal under Section 7 of Clayton Act?

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REFERENCE TO REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals is reported at 725 F.2d 300 and is reproduced at App. 1 *et seq.* The opinion of the District Court is reported at 543 F. Supp. 1255 and is reproduced at App. 11 *et seq.*

JURISDICTION

The judgment of the Circuit Court of Appeals was made and entered on February 21, 1984. App. 43. A timely petition for rehearing and suggestion for rehearing in banc were denied on March 21, 1984. App. 45. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTES INVOLVED

Sherman Act, § 1 (15 U.S.C. § 1):

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . .

Sherman Act, § 2 (15 U.S.C. § 2):

> Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . .

Clayton Act, § 4 (15 U.S.C. § 15):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Clayton Act § 7 (15 U.S.C. § 18):

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country,

the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Clayton Act, § 16 (15 U.S.C. § 26):

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this act [15 USCS §§ 13, 14, 18 and 19], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, . . .

STATEMENT OF THE CASE

Petitioner, Bayou Bottling, Inc. (Bayou"), brought this action under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act against respondents, Dr Pepper Company ("Dr Pepper") and Coca-Cola Bottling Company of Lake Charles, Louisiana ("LCC"), seeking treble damages under Section 4 of the Clayton Act and divestiture under Section 16 of the Clayton Act. The jurisdiction of the District Court was invoked under 28 U.S.C. section 1331. The United States District Court for the Western District of Louisiana, the Honorable Earl E. Veron, presiding, granted the defendants' motions for summary judgment. 543 F. Supp. 1255. The U.S. Court of Appeals for the Fifth Circuit affirmed the summary judgment on February 21, 1984. 725 F. 2d 300. Timely petitions for rehearing and rehearing en banc were denied on March 21, 1984.

Bayou is a wholesaler and distributor of soft drinks, principally as a franchisee of Pepsi Cola and 7-Up, headquartered in Lake Charles, Louisiana. Respondent LCC is also a wholesaler and distributor of soft drinks in Lake Charles, as well as in Lafayette, Louisiana. LCC's principal products are Coca-Cola and, since 1976, Dr Pepper. Respondent Dr Pepper manufactures the concentrate used to make the regular and diet versions of Dr Pepper. It sells concentrate to local franchisees, such as LCC, who produce and sell the soft drinks to a variety of retailers. The relevant product market is soft drinks. The relevant geographic market is the area covered by LCC's Dr Pepper franchise, which is approximately the southwest quadrant of the State of Louisiana and is substantially co-extensive with Bayou's franchise territory.

In 1974 the Dr Pepper franchise in Lake Charles was owned by one Lloyd Wilcox, who planned to sell his busi-

ness and retire. Dr Pepper was the No. 2 selling soft drink, with about 30% of the relevant market. There were only two prospective purchasers for the Wilcox franchise: Bayou, which had approximately 20% of the soft drink market, and LCC, which had approximately 50%. The business of bottling and wholesaling soft drinks entails significant economies of scale, so that the unit costs of Wilcox and Bayou were significantly higher than LCC's and their ability to offer effective price competition was correspondingly limited.

In April of 1975 Bayou and Wilcox reached an oral agreement that Bayou would purchase Wilcox's entire bottling business for $1 million.

However, Dr Pepper had a policy of combining its franchises with Coca-Cola franchises where possible. Pursuant to this policy, an officer of Dr Pepper dissuaded Wilcox from selling to Bayou and persuaded him to sell instead to LCC for $1 million, even though Bayou was ready, willing and able to proceed. It was established for purposes of the summary judgment motion that Bayou would have acquired the Wilcox franchise but for the concerted interference of Dr Pepper and LCC.

Bayou's proof showed that if it had acquired the Wilcox franchise, competition in the relevant market would have increased. The increase in Bayou's volume would have reduced its unit costs and placed it on a substantially equal competitive footing with LCC. In addition, Bayou would have been marketing one of the two nationally advertised drinks in the popular "pepper" flavor category, Dr Pepper, and LCC would have been marketing the other, Coca-Cola Company's Mr PiBB.

Respondents also conceded for purposes of their summary judgment motion that acquisition of the Wilcox fran-

chise by LCC not only precluded the improvement in competition that would have resulted from Bayou's acquisition of the franchise, but also further impaired competition. LCC's market share jumped due to the merger from 50% to 80%, resulting in monopolization of the market. Bayou was left with 20% of the market. This disparity meant, in practical terms, that LCC became substantially free from competitive pricing pressure.*

The LCC-Wilcox merger caused certain other disadvantages for Bayou that would not have occurred if Wilcox had retained his franchise or had sold it to a third party. For example, by the merger LCC acquired at least a 5-to-1 LCC advantage in vending machine sales plus the power to offer site owners the two top brands in this market (Coca Cola and Dr Pepper). This enabled LCC to induce the owners of vending machines to exclude Bayou's products in return for free servicing of their machines, since LCC can readily persuade them that its own products will substantially satisfy the market. In a similar fashion, the merger enhanced LCC's power to exclude Bayou's products from vending machines and coolers leased by LCC to various site owners. As a further direct result of the illegal 80% market share (defendants conceded the merger was illegal for purposes of the summary judgment motion) LCC gained overwhelming dominance in the

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* Due to the high-volume nature of the business, the increased *disparity* in market share meant increased disparity in economies of scale and unit costs. Bayou's unit cost disadvantage means it can no longer put significant pricing pressure on LCC. LCC can set its prices based on *Bayou's* (higher) unit costs and the difference (LCC's unit cost versus Bayou's) becomes LCC's monopolistic profit. In the monopolized market now existing, Bayou can only "follow" LCC's pricing, and LCC's sales manager admits LCC sets its prices without regard to competitive pressure. *See* Trahan and Dr. Mills affidavits, App. 68-69 and 91-92.

shelf space in retail stores and the arrangement of soft drinks thereon so as to maximize its sales and minimize Bayou's (the allocation of shelf space and arrangement of products thereon is largely left to the suppliers by store owners); L C engaged in discriminatory, below-cost pricing in Bayou's marketing area, but not in others, in specific response to a particular soft drink package which Bayou was successfully marketing.

After Bayou lost Wilcox's Dr Pepper franchise, it tried to obtain a Mr PiBB franchise from Coca-Cola Company but was repeatedly refused on the ground such franchise was available only to Coca-Cola bottlers. Respondents were aware of this policy at the time they arranged the LCC-Wilcox merger. Although it is a Coke bottl r, LCC has agreed with Dr Pepper not to market Mr PiBB. When Bayou tried to develop its own "pepper" drink, Dr Pepper obtsructed Bayou's attempted trademark registration so that Bayou's efforts were frustrated. Dr Pepper is the only soft drink in its flavor category now sold in the relevant market.

ARGUMENT

I.

SPECIAL AND IMPORTANT REASONS EXIST WHY REVIEW ON WRIT OF CERTIORARI SHOULD BE GRANTED.

The decision of the Court of Appeals conflicts with decisions of other federal courts of appeal in the matters of (1) what constitutes "antitrust injury" and (2) the right of a private party to obtain divestiture under Section 16 of the Clayton Act.

This Court should settle the questions of whether and under what circumstances a private party is entitled to the remedy of divestiture under Section 16 of the Clayton Act.

The Court of Appeals has restricted the damage remedy under Section 4 of the Clayton Act in a manner contrary to the rulings of this Court and to the intent of the Act.

II.

THIS COURT SHOULD CLARIFY WHAT IS MEANT BY "ANTITRUST INJURY."

Under *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), a plaintiff must show an injury caused by that which makes the defendants' acts unlawful.[1] Under

[1] The District Court erroneously stated (App. 22) Bayou "is of the firm belief" that it is entitled to compensation "for any and all injuries which would not have been suffered but for such alleged violations [of the antitrust laws]." Bayou never so contended. It has always recognized that not all injuries traceable to antitrust violations are compensable. However, once the nature of the defendants' antitrust violations is understood, we submit it becomes evident that the damages claimed by Bayou flow from that which made the defendants' acts unlawful and that there is no valid *Brunswick* objection to Bayou's claims.

Blue Shield of Virginia v. *McCready*, 457 U.S. 465, 472 (1982), courts are required to honor "Congress' 'expansive remedial purpose' in enacting Section 4" of the Clayton Act and, after examining a defendant's anti-competitive acts, compensate the damages forseeably caused by an illegal scheme. If the plaintiff is a "victim along the route" to defendants' illegal goal or if its injury is "inextricably intertwined" with the defendants' creation of a monopoly or if its injury is a forseeable or intended consequence of the defendants' illegal acts, then it has suffered antitrust injury under *McCready*. 457 U.S. at 479, 484. Under *Associated General Contractors* v. *California State Council of Carpenters*, ... U.S. ...., 103 S. Ct. 897, 908-12, 74 L. Ed. 2d 723 (1983), courts must evaluate the relationship between the violation and the claimed injury in terms of a number of factors, including causal relationship, motivation, nature of the injury, directness, speculative nature of damages and possibility of duplicative recovery. *See*, *McDonald* v. *Johnson & Johnson*, 722 F.2d 1370, 1373-74 (8th Cir. 1983).

In respect to the "antitrust injury" issue, this Court should take jurisdiction of the case to clarify the law in two important respects:

First, this Court should make clear that in resolving "antitrust injury" issues, a court must first analyze the nature of the *violation—i.e.*, analyze precisely what the violative characteristics of the defendants' behavior were—as the starting point in determining by application of the factors described by this court in *Associated General Contractors, supra*, 103 S. Ct. at 908-12, whether the claimed injuries arise from that violative conduct.

Second, this Court should reject the "alternative hypothetical cause" test relied upon by the District Court (App. 31) and Court of Appeals (App. 7) herein, since, we submit, that test is a misinterpretation of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, 429 U.S. at 487.

A. A court must first analyze the nature of the violation before proceeding to determine whether the claimed injuries were incurred, under Brunswick, by reason of that violation.

We contend a fair determination as to whether "antitrust injury" has been inflicted cannot be made without first analyzing what it is about the defendants' activities that makes them antitrust violations. Neither the District Court nor the Court of Appeals here made any attempt to analyze the nature of the respondents' conceded antitrust violations. Had they done so, they could not have concluded that Bayou did not sustain antitrust injury.

For example, respondents conceded they had conspired to restrain trade in violation of Section 1 of the Sherman Act by (a) blocking a pro-competitive acquisition by Bayou and (b) accomplishing an anti-competitive, monopoly-creating acquisition by the respondent LCC. This was unlawful because it doubly frustrated the fundamental objective of the antitrust laws to preserve and encourage competition. Bayou's ability to compete was impaired by the respondents. The dual unlawfulness of the respondents' conduct here was precisely in preventing the enhancement of competition in this marketplace that, under Bayou's proofs, would have resulted if Bayou had obtained the Wilcox franchise, and instead causing a reduction from former levels of competition in the same marketplace. *See* Dr. Mills' affidavit, esp. at App. 90 *et seq.*, and generally the Trahan and Byrnes affidavits, App. 46 *et seq.*, 75 *et seq.* We submit that when one recognizes what the violative conduct was in the instant case, it is self-evident that Bayou's loss of the Dr Pepper franchise arose out of the antitrust violation and was an injury sustained "by reason of" forbidden antitrust misconduct, within the meaning of Section 4 of the Clayton Act, as interpreted by ***Brunswick, McCready*** and ***Associated General Contractors.***

Additional examples arise out of respondents' conceded monopolization of the relevant market in soft drink wholesaling.[2] The intentional creation of a monopoly by means of a merger is one of the clearest offenses under Section 2 of the Sherman Act.[3] III Areeda & Turner, *Antitrust Law*

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[2] The Court of Appeals made no effort to justify numerous plain errors which served as the foundation for the District Court's grant of summary judgment. For example, the District Court held (App. 26) ". . . the agreement between Dr Pepper and LCC to join hands against Bayou was not, standing alone, in restraint of trade or anticompetitive in effect." In fact, the respondents conceded for purposes of this summary judgment that the agreement was in restraint of trade and anticompetitive in effect. Similarly, the District Court stated that "though Bayou does not now compete on an equal footing with LCC, they (sic) do nonetheless compete." It was in fact conceded Bayou cannot provide *effective* competition, which is what the antitrust laws seek to protect. Further, contrary to the District Court's holding (App. 26) retail store owners and consumers *are* concededly hampered in their freedom to choose between LCC's products and Bayou's because Bayou cannot provide effective price competition to LCC. Remarkably, the District Court even found that "[c]ompetition is alive and well in the Lake Charles softdrink industry . . ." (App. 39), even though the defendants conceded that the market is monopolized.

[3] Another remarkable District Court holding (which the Court of Appeals did not attempt to justify) was that "Bayou has failed to demonstrate to this court any facts which could give rise to a reasonable inference that LCC's market dominance is the result of wilful acquisition of monopoly power" (App. 38) and that the record is ". . . devoid of evidence of intent to bring about a monopoly." (App. 39) The monopoly here was achieved by a merger, and the existence of the monopoly and wilful acquisition thereof were conceded for purposes of the summary judgment motion. *See, United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); [1955] Att'y Gen. Rep. 61 ("Companies do not combine or conspire without an intent to make use of the power they thereby obtain.")

(footnote continued)

¶701a at 101-02 (1978) states:

> [W]hatever the original source of a monopoly, *a monopolist's acquisition of the assets of an actual or likely potential competitor is properly classified as exclusionary,* for it tends to augment or reinforce the monopoly *by means other than competition on the merits.* Moreover, a merger that creates or adds to monopoly power would plainly violate Clayton Act §7 where the firms involved are corporations, so that *divestiture of the acquired firm would be required in any event.* (Emphasis supplied.)

LCC's ability to exclude Bayou from vending machines, coolers and shelf space—the points of sale, where dominance really matters—*was achieved by an illegal merger.* The Court of Appeals states (App. 8):

> When LCC acquired Wilcox's Dr Pepper operation, it received that product's share of the shelf space. Bayou acknowledged that store owners apportion their shelf space on the basis of sales and that LCC has only that portion consistent with its total share of the soft drink market. But Bayou implies an antitrust injury and suggests an entitlement to more shelf space than its market share would justify. The district court correctly rejected this asserted antitrust injury.

Apart from the fact that Bayou never acknowledged that store owners apportion shelf space uninfluenced as to location, prominence and other sales-inducing factors by a monopoly bottler in the market, it seems self-evident that

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(footnote continued)

United States v. *Griffith,* 335 U.S. 100, 105 (1948); *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 173 (1948). General intent to monopolize is present if monopoly is the probable result of what is done, "for no monopolist monopolizes unconscious of what he is doing." *American Tobacco Co.* v. *United States,* 328 U.S. 781, 814 (1946); *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 432 (2d Cir. 1945); *United States* v. *Paramount Pictures, Inc., supra,* 334 U.S. at 173.

the respondents' overwhelming dominance at the points of sale was the result and reflection of an illegally obtained monopolistic share. Respondents conceded as much in their appeal brief. The competitive disadvantage to the petitioner resulting from this monopolized state of the market is the clearest kind of antitrust injury, once it is recognized how the dominant share was obtained.

We have referred above to other specific ways Bayou was damaged precisely because it is in a monopolized market: its products are excluded from vending machines; it has little influence as to the amount or arrangement of shelf space; it cannot sell any drink in the "pepper" flavor category; it cannot fight for a larger market share through price competition because the disparity in unit costs has become so great. Respondents concede this dominance is a direct result of and reflects their monopoly. Respondents also concede the merger, *i.e.*, the violation, enhanced their power to exclude Bayou products from vending machines (both those leased and those owned by site owners) and that that enhancement has produced more exclusion of Bayou products and related additional losses in sales and profits by Bayou.

The Court of Appeals brushed these effects aside (App. 7) saying, "Without anything more, these practices are not barred by the antitrust laws," citing *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F.2d 76, 93 (2d Cir. 1981), to the effect that even monopolists are allowed to compete. The Court overlooked the decisive difference that in *Northeastern Telephone* the defendant obtained its monopoly legally (651 F.2d at 79, 85), whereas LCC's monopoly was obtained illegally.

The Court of Appeals thus took the unprecedented position that where a dominant competitor deliberately achieves illegal monopoly power the competitive advantages result-

ing from that power are immune from attack by disadvantaged competitors—that exclusionary practices made possible by that power are mere "competitive acts." Such a result is contrary to the purposes of the antitrust laws and cannot stand. We submit such a result would never have been reached if the Court of Appeals had analyzed the nature of the violations before proceeding to determine whether the claimed injuries could legitimately be considered to be effects of the violations within the meaning of *Brunswick, McCready* and *Associated General Contractors.*

B. This Court should reject the "alternative hypothetical cause" test relied upon by the District Court (App. 31) and Court of Appeals (App. 7).

As noted, had Bayou acquired the Dr Pepper franchise, competition in the Lake Charles marketing area would have been enhanced: LCC would have been faced with effective competition and two nationally advertised brands in the same flavor category (Dr Pepper and Mr PiBB) would have been marketed there instead of only one. Foreclosure of Bayou from the franchise is thus one of the things which made defendants' concerted conduct anticompetitive and therefore illegal under the antitrust laws. We submit it is clear Bayou's loss of the franchise was an injury flowing from that which made the defendants' acts unlawful.

The District Court held to the contrary on the ground "Bayou would have suffered this injury no matter who acquired the franchise, or if it had not been sold at all." (App. 31). This misapplication of *Brunswick* (see discussion below) became the determinative test utilized by the Court of Appeals (App. 7: "Bayou would have suffered the identical loss of sales, and economies of scale, if Wilcox had retained his operation or if he had sold to a third party"). Even if this test were factually tenable in the

instant case (it is not),[4] the test is an erroneous application of *Brunswick*, and would virtually rule out damage claims under Section 4 of the Clayton Act because any damage (even from a *per se* violation), whether a competitive injury or not, *could* result from a hypothetical cause not involving antitrust violation. It is, for example, no answer to a price-fixing charge that the victims might have been similarly injured by common cheating or failure to shop around. The respondents' interpretation of *Brunswick* adopted here by both Courts below is so sweeping that it makes the exception engulf the rule and effectively destroys Section 4.

The hypotheticals posed by the Courts below (that someone else acquired the franchise, or that it wasn't sold) may or may not involve anticompetitive conduct. If they did, the conduct could very well be the basis for an antitrust claim. The holdings below are contrary to repeated holdings that "Recovery can be had for a wrongfully frustrated attempt to enter a business." *See, e.g., Hayes* v. *Solomon*, 597 F.2d 958, 973 (5th Cir. 1979); *American Banana Co.* v. *United Fruit Co.*, 166 F.2d 261, 264 (2d Cir. 1908), *aff'd*, 213 U.S. 347 (1909): "It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business." If the reasoning of the Courts below were accepted, no person frustrated in an attempt to enter a business could sue because it could always be hypothesized that the exclusion *could* have been caused by non-antitrust conduct or some other factor.

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[4] As repeatedly shown in the facts of this case, numerous injuries claimed by Bayou arise solely due to the fact that 80% of the market power has now been illegally concentrated in Bayou's one remaining competitor, LCC—which injuries would not have occurred had someone else acquired the franchise, or if it had not been sold at all.

The Courts below failed to read *Brunswick's* language in context. In *Brunswick,* Pueblo Bowl-O-Mat claimed injury because, if the number of competitors had *decreased*, it hoped to profit. Such a "loss"—resulting from Brunswick's efforts to *preserve* competition by acquiring the failing operations—was not related to Brunswick's size and is not compensable because the antitrust laws are not to be used to attack pro-competitive activity.

Bayou's injuries are not like *Brunswick's* plaintiff but result instead from *anti-competitive* activity by the respondents. They manifestly result from that which made respondents' conduct illegal in two respects. First, Bayou was prevented from achieving a size that would have placed it on an equal competitive footing with LCC. Second, LCC's market share escalated from 50% to a monopoly, with approximately 80% of the market. There is not *more* competition following the merger (as in *Brunswick*) but *less.*

The correct construction of the *Brunswick* language is shown by *Blue Shield of Virginia* v. *McCready,* 457 U.S. 465 (1982). In *McCready* the defendants' aim was to destroy competition from psychologists. Their means was to deny reimbursement to patients such as Mrs. McCready who had consulted psychologists. The Court held this actionable under the antitrust laws because injury to McCready was the "means by which competition was restricted" and her injury was inextricably intertwined with the injuries defendants sought to inflict on psychologists. Such injuries flowed from that which made the defendants' acts unlawful because the defendants' conspiracy against psychologists forseeably and intentionally injured McCready.

The conceded objective of the respondents' conspiracy here was to monopolize the market by depriving the petitioner of the Wilcox franchise and merging it instead into

LCC. Bayou's standing is even clearer than McCready's, however, because Bayou was the only remaining competitor once the monopoly was achieved and it was competitively hamstrung due to the economies of scale and increased unit cost advantage realized by LCC through the merger.

The Court of Appeals emphasized that if Wilcox had retained his operation or sold it to a third party, Bayou would be without the franchise without any antitrust violation having occurred. This Court should make clear that the fact that hypothetical non-anti-competitive conduct might have caused a similar injury is beside the point. What *did* happen is that LCC and Dr Pepper took the Wilcox franchise away from Bayou and placed it with LCC, creating a monopoly in the process and assuring Bayou would not achieve the competitive parity with LCC that would have resulted from Bayou's acquisition of the Wilcox franchise.

If the "alternative hypothetical cause" test adopted by the Courts below is allowed to stand and is followed, whole areas of antitrust damages will be thrown into enormous confusion. Proving such damages would become substantially impossible because an antitrust plaintiff would be called upon to prove his damages *could not* have been caused by some hypothetical non-antitrust misconduct—a fact which can never be proved.

III.

A PRIVATE ANTITRUST PLAINTIFF SHOULD BE ENTITLED TO DIVESTITURE AS A FORM OF INJUNCTIVE RELIEF UNDER SECTION 16 OF THE CLAYTON ACT.

This Court has not yet ruled on this important question, though it has been the subject of extensive scholarly writing and of conflicting decisions among the circuits. *See, e.g.*, II Areeda & Turner, *Antitrust Law*, §328b at 137 (1978); Note, "The Use of Divestiture in Private Anti-

trust Suits,'' 43 Geo. Wash. L. Rev., 261, 268 (1974); Note, ''Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act,'' 49 Minn. L. Rev. 267 (1974); ABA Antitrust Section, Antitrust Law Developments (2d ed. 1984), at 420-21. *Compare International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913 (9th Cir. 1976), and *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), with *Fuchs Sugar & Syrups, Inc.* v. *Amstar Corp.*, 402 F. Supp. 636, 640 (S.D.N.Y. 1975), and *Treadway Co.* v. *Brunswick Corp.*, 523 F.2d 262, 278-79 (3rd Cir. 1975), *rev'd on other grounds sub nom., Brunswick* v. *Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477 (1977). ABA, Section of Antitrust Law, Monograph 1, *The Private Enforcement of Section 7 of the Clayton Act*, states at 4:

> A principal question which the courts have confronted in private Section 7 actions is whether the equitable remedies available in such an action include divestiture. The crux of the problem is whether the word ''injunctive'' which describes the relief to be granted under Section 16 can include divestiture or is intended to be more limited. The answer is unclear and the issue is of evident importance.

Bayou sought divestiture under Section 16 of the Clayton Act on the ground that merging the Wilcox franchise into the LCC franchise violated Section 7 of the Clayton Act. The issue was fully briefed and argued in the District Court[5] and the Court of Appeals.[6] The District Court's decision ignored the issue entirely. The Court of Appeals did not expressly address the issue but apparently denied relief on the ground there was no antitrust injury. 725 F.2d at 305, App. 10.

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[5] Bayou's Brief in Opposition to Summary Judgment at 68-71, and Proposed Findings of Fact and Conclusions of Law at 23-24.

[6] Bayou's Brief at 45 and Reply Brief at 21-23.

There is ample evidence justifying Bayou's right to injunctive relief under Section 16 of the Clayton Act, because of the actual antitrust injuries it has sustained.[7] Even if it had suffered no injury by virtue of LCC's conceded monopolization and illegal merger, it is not necessary that a private party show *any* actual damage in order to obtain injunctive relief under Section 16. Threatened damage is enough. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 129-30 (1969). Bayou, attempting to stay alive as the only remaining competitor in the monopolized market, has not only been injured and threatened with injury but is also the person *most likely* to vindicate the purposes of the antitrust laws by challenging the merger which created the monopoly.

Congress intended private antitrust litigation to be a sure and effective weapon for enforcement of the antitrust laws. *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.,* 381 U.S. 311, 318 (1965). The Court stated in *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra.,* at 130-31:

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[7] For example, LCC's possession of 80% of the shelf space in retail outlets is illegal, because it is the direct effect of the illegally achieved merger and market share; its 80% share of the shelf space gives its product a "billboard" impact upon consumers, rendering Bayou's products effectively unnoticed and resulting in further losses of sales and of market share by Bayou. (Dr. Mills and Trahan affidavits at App. 69-70, 92-93). Further, LCC uses its huge percentage of shelf space to bootstrap itself into an even higher percentage (and Bayou a correspondingly lower percentage) of the shelf space (*Id.* at App. 69-70, 92-93). Similarly, exclusion of Bayou's products from vending machines (both those leased by LCC to others and those owned by others) is enhanced by the monopolistic share of the market achieved by LCC, producing further losses of sales and profits for Bayou. (Dr. Mills 93-94, Trahan App. 72-73). See also the further injuries discussed above.

> [T]he purpose of giving private parties . . . injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the [injunctive] remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." Its availability should be "conditioned by the necessities of the public interest which Congress has sought to protect."

United States v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 328 (1961), a Section 7 case, held:

> The very words of §7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control and it is reasonable to think immediately of the same remedy when §7 of the Clayton Act, which particularizes the Sherman Act's standard of illegality, is involved. . . . Divestiture has been called the most important of the antitrust remedies. It is simple, relatively easy to administer and sure. *It should always be in the forefront of the court's mind when a violation of §7 has been found.* (Emphasis supplied.)

The violation of Section 7 in this case is conceded. The "undoing of the acquisition is a natural remedy" in private cases as much as in cases brought by the Government. As stated by Areeda & Turner, *id.* at 137:

> To hold a merger unlawful in a private suit while refusing to decree the undoing of that merger makes little sense in terms of antitrust policy.
>
> Fortunately, other courts [than the Ninth Circuit in the *ITT* case] have indicated, correctly, that divestiture is available in a private suit challenging unlawful

> mergers. . . [D]ivestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff.

Bayou properly raised the issue in both courts below. Because of its great importance, the issue should be considered by this Court.

CONCLUSION

Based upon the foregoing considerations, the petitioner respectfully requests that a writ of certiorari issue to review the decision of the Court of Appeals.

Respectfully submitted,

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